

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JACK R. STRUCK,	)	
	)	No. CV-09-190-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on March 5, 2010 (Ct. Rec. 13, 17). Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Nancy Mishalanie represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge (Ct. Rec. 6). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 17) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13).

**JURISDICTION**

Plaintiff applied for supplemental security income (SSI) on June 9, 2006, alleging onset as of August 3, 2003 (Tr. 120-122). The application was denied initially and on reconsideration (Tr. 92-95, 97-98). Administrative Law Judge (ALJ) R.S. Chester held a hearing on May 29, 2008 (Tr. 27-89). Plaintiff, represented by

1 counsel, medical expert George Rodkey, M.D., and vocational expert  
2 K. Diane Kramer testified. On June 13, 2008, the ALJ issued a  
3 decision (Tr. 16-24) finding plaintiff is disabled when substance  
4 abuse is included. The ALJ found DAA is a contributing factor  
5 material to plaintiff's disability determination (Tr. 21) and when  
6 DAA is excluded, plaintiff can perform past relevant work making  
7 him not disabled (Ct. Rec. 22-24). Accordingly, the ALJ found  
8 plaintiff not disabled (Tr. 24). The Appeals Council first denied  
9 review on April 24, 2009 (Ct. Rec. 3-6). After receiving  
10 plaintiff's additional evidence, the Council denied review a  
11 second time on May 14, 2009 (Tr. 1-2). Therefore, the ALJ's  
12 decision became the final decision of the Commissioner, which is  
13 appealable to the district court pursuant to 42 U.S.C. § 405(g).  
14 Plaintiff filed this action for judicial review pursuant to 42  
15 U.S.C. § 405(g) on June 23, 2009 (Ct. Recs. 1,4).

#### 16 **STATEMENT OF FACTS**

17 The facts have been presented in the administrative hearing  
18 transcript, the ALJ's decision, referred to as necessary in the  
19 briefs of both plaintiff and the Commissioner, and will only be  
20 summarized here.

21 Plaintiff was 51 years old when he applied for benefits. He  
22 graduated from high school and completed one and a half years of  
23 college (Tr. 21,41). Mr. Struck has worked as a groundskeeper,  
24 material handler, institutional cook, and outside deliverer (Tr.  
25 42-48,60-62,68-72). He alleges disability since August 3, 2003,  
26 due to cardiomyopathy, limited right eye vision, COPD, hepatitis  
27 C, degenerative disc disease (DDD), hypothyroidism, and  
28 degenerative arthrosis in both hands.

1 Plaintiff alleges the ALJ erred when he weighed the medical  
2 evidence, assessed credibility, and determined his RFC (Ct. Rec.  
3 14 at 9-12). At the hearing plaintiff's counsel opined "there is  
4 a substantial question as to whether DAA is material or not" (Tr.  
5 73). The Commissioner asserts the ALJ's decision should be  
6 affirmed because it free of error and supported by the evidence  
7 (Ct. Rec. 18 at 8).

#### 8 SEQUENTIAL EVALUATION PROCESS

9 The Social Security Act (the Act) defines "disability"  
10 as the "inability to engage in any substantial gainful activity by  
11 reason of any medically determinable physical or mental impairment  
12 which can be expected to result in death or which has lasted or  
13 can be expected to last for a continuous period of not less than  
14 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
15 Act also provides that a Plaintiff shall be determined to be under  
16 a disability only if any impairments are of such severity that a  
17 plaintiff is not only unable to do previous work but cannot,  
18 considering plaintiff's age, education and work experiences,  
19 engage in any other substantial gainful work which exists in the  
20 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
21 Thus, the definition of disability consists of both medical and  
22 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
23 (9<sup>th</sup> Cir. 2001).

24 The Commissioner has established a five-step sequential  
25 evaluation process for determining whether a person is disabled.  
26 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
27 is engaged in substantial gainful activities. If so, benefits are  
28 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If

1 not, the decision maker proceeds to step two, which determines  
2 whether plaintiff has a medically severe impairment or combination  
3 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
4 416.920(a)(4)(ii).

5 If plaintiff does not have a severe impairment or combination  
6 of impairments, the disability claim is denied. If the impairment  
7 is severe, the evaluation proceeds to the third step, which  
8 compares plaintiff's impairment with a number of listed  
9 impairments acknowledged by the Commissioner to be so severe as to  
10 preclude substantial gainful activity. 20 C.F.R. §§  
11 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
12 App. 1. If the impairment meets or equals one of the listed  
13 impairments, plaintiff is conclusively presumed to be disabled.  
14 If the impairment is not one conclusively presumed to be  
15 disabling, the evaluation proceeds to the fourth step, which  
16 determines whether the impairment prevents plaintiff from  
17 performing work which was performed in the past. If a plaintiff  
18 is able to perform previous work, that Plaintiff is deemed not  
19 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
20 this step, plaintiff's residual functional capacity ("RFC")  
21 assessment is considered. If plaintiff cannot perform this work,  
22 the fifth and final step in the process determines whether  
23 plaintiff is able to perform other work in the national economy in  
24 view of plaintiff's residual functional capacity, age, education  
25 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
26 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

27 The initial burden of proof rests upon plaintiff to establish  
28 a *prima facie* case of entitlement to disability benefits.

1 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
2 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
3 met once plaintiff establishes that a physical or mental  
4 impairment prevents the performance of previous work. The burden  
5 then shifts, at step five, to the Commissioner to show that (1)  
6 plaintiff can perform other substantial gainful activity and (2) a  
7 "significant number of jobs exist in the national economy" which  
8 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
9 Cir. 1984).

10 Plaintiff has the burden of showing that drug and alcohol  
11 addiction (DAA) is not a contributing factor material to  
12 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9<sup>th</sup> Cir. 2001).  
13 The Social Security Act bars payment of benefits when drug  
14 addiction and/or alcoholism is a contributing factor material to a  
15 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);  
16 *Bustamante v. Massanari*, 262 F.3d 949 (9<sup>th</sup> Cir. 2001); *Sousa v.*  
17 *Callahan*, 143 F.3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there is  
18 evidence of DAA and the individual succeeds in proving disability,  
19 the Commissioner must determine whether DAA is material to the  
20 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935.  
21 If an ALJ finds that the claimant is not disabled, then the  
22 claimant is not entitled to benefits and there is no need to  
23 proceed with the analysis to determine whether substance abuse is  
24 a contributing factor material to disability. However, if the ALJ  
25 finds that the claimant is disabled, then the ALJ must proceed to  
26 determine if the claimant would be disabled if he or she stopped  
27 using alcohol or drugs.

28 **STANDARD OF REVIEW**

1 Congress has provided a limited scope of judicial review of a  
2 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
3 the Commissioner's decision, made through an ALJ, when the  
4 determination is not based on legal error and is supported by  
5 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
6 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
7 1999). "The [Commissioner's] determination that a plaintiff is  
8 not disabled will be upheld if the findings of fact are supported  
9 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
10 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence  
11 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
12 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
13 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
14 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
15 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
16 evidence as a reasonable mind might accept as adequate to support  
17 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
18 (citations omitted). "[S]uch inferences and conclusions as the  
19 [Commissioner] may reasonably draw from the evidence" will also be  
20 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
21 On review, the Court considers the record as a whole, not just the  
22 evidence supporting the decision of the Commissioner. *Weetman v.*  
23 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
24 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

25 It is the role of the trier of fact, not this Court, to  
26 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
27 evidence supports more than one rational interpretation, the Court  
28 may not substitute its judgment for that of the Commissioner.

1 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
2 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
3 substantial evidence will still be set aside if the proper legal  
4 standards were not applied in weighing the evidence and making the  
5 decision. *Browner v. Secretary of Health and Human Services*, 839  
6 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
7 evidence to support the administrative findings, or if there is  
8 conflicting evidence that will support a finding of either  
9 disability or nondisability, the finding of the Commissioner is  
10 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
11 1987).

#### 12 **ALJ'S FINDINGS**

13 At step one the ALJ found Mr. Struck did not engage in  
14 substantial gainful activity after he applied for benefits (Tr.  
15 18). At steps two and three, ALJ Chester found plaintiff suffers  
16 from cardiomyopathy, secondary to intravenous (IV) drug use,  
17 limited right eye vision, following cataract surgery, and non-  
18 severe controlled chronic obstructive pulmonary disease (COPD),  
19 quiescent hepatitis C, mild DDD, controlled hypothyroidism and  
20 non-limiting degenerative arthrosis of the bilateral hands (Tr.  
21 18), impairments that are severe but which do not alone or in  
22 combination meet or medically equal a Listed impairment (Tr. 19).  
23 The ALJ found plaintiff less than completely credible (Tr. 23).  
24 When DAA is included, the ALJ found plaintiff disabled (Tr. 21).  
25 He found if Mr. Struck stopped abusing substances, he would still  
26 have severe but not Listing-level impairments (Tr. 21-22). If  
27 plaintiff stopped abusing substances, the ALJ found he would be  
28 able to perform medium work, enabling him to perform five of his

1 past jobs (Tr. 22-24). The ALJ found DAA was a contributing  
2 factor material to the disability determination (Tr. 24).  
3 Accordingly, the ALJ found that plaintiff is barred from receiving  
4 benefits and therefore not disabled as defined by the Social  
5 Security Act (Tr. 24).

#### 6 **ISSUES**

7 Plaintiff contends the Commissioner erred as a matter of law  
8 when he failed to properly credit the opinions of the medical  
9 expert and treatment providers, and when he found DAA materially  
10 contributes to the disability finding. Mr. Struck also alleges  
11 the ALJ erred when he assessed credibility and determined his RFC  
12 (Ct. Rec. 14 at 7). The Commissioner asserts the Court should  
13 affirm the ALJ's decision because it is without error and  
14 supported by the evidence (Ct. Rec. 18 at 8).

#### 15 **DISCUSSION**

##### 16 **A. Weighing medical evidence**

17 In social security proceedings, the claimant must prove the  
18 existence of a physical or mental impairment by providing medical  
19 evidence consisting of signs, symptoms, and laboratory findings;  
20 the claimant's own statement of symptoms alone will not suffice.  
21 20 C.F.R. § 416.908. The effects of all symptoms must be  
22 evaluated on the basis of a medically determinable impairment  
23 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
24 416.929. Once medical evidence of an underlying impairment has  
25 been shown, medical findings are not required to support the  
26 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
27 341, 345 (9<sup>th</sup> Cr. 1991).

28 A treating physician's opinion is given special weight

1 because of familiarity with the claimant and the claimant's  
2 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
3 Cir. 1989). However, the treating physician's opinion is not  
4 "necessarily conclusive as to either a physical condition or the  
5 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
6 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
7 a treating physician than an examining physician. *Lester v.*  
8 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
9 weight is given to the opinions of treating and examining  
10 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
11 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
12 physician's opinions are not contradicted, they can be rejected  
13 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
14 If contradicted, the ALJ may reject an opinion if he states  
15 specific, legitimate reasons that are supported by substantial  
16 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
17 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

18 In addition to the testimony of a nonexamining medical  
19 advisor, the ALJ must have other evidence to support a decision to  
20 reject the opinion of a treating physician, such as laboratory  
21 test results, contrary reports from examining physicians, and  
22 testimony from the claimant that was inconsistent with the  
23 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
24 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
25 Cir. 1995).

#### 26 **B. Dr. Rodkey's testimony**

27 Mr. Struck asserts (1) the ALJ had a duty to determine if it  
28 is Dr. Rodkey's opinion plaintiff meets the requirements of

1 current Listings 4.02 or 4.04; (2) the ALJ could have taken  
2 judicial notice plaintiff's cardiac condition met or equaled a  
3 Listed impairment; and (3) because Dr. Rodkey's RFC for medium  
4 work failed to take into account all of Mr. Struck's impairments,  
5 the ALJ erred by adopting his assessment (Ct. Rec. 14 at 10-11).

6 Plaintiff alleges the ALJ failed to properly weigh Dr.  
7 Rodkey's opinion with respect to Mr. Struck's heart condition (Ct.  
8 Rec. 14 at 9-10; Tr. 30). Dr. Rodkey opined plaintiff's cardiac  
9 condition met Listing 4.08, as Mr. Struck observes (Ct. Rec. 14 at  
10 10; Tr. 30).

11 With respect to the first period of Listing-level impairment,  
12 Dr. Rodkey testified plaintiff's ejection fraction (EF) of fifteen  
13 percent (15%) in September of 2003 prevented all work. His  
14 opinion was based on an outdated (January 2005) "Blue Book"  
15 indicating an EF of less than thirty percent (30%) met Listing  
16 4.08 (Tr. 30-31;35). In his decision the ALJ acknowledges Dr.  
17 Rodkey relied on an outdated version of the Listings (Tr. 20).  
18 The outdated Listing has no significance, however, because Dr.  
19 Rodkey testified plaintiff's EF improved to 43% in less than a  
20 year. Because the condition did not last twelve months as  
21 required, Mr. Struck was not disabled pursuant to the Listing  
22 during this period (Tr. 30,34,37). The ALJ properly relied on Dr.  
23 Rodkey's testimony because it is supported by objective evidence,  
24 namely, plaintiff's ejection fraction test results.

25 Dr. Rodkey testified plaintiff met the same Listing beginning  
26 in May of 2007 (Tr. 31-33). He based his opinion on the records  
27 of treating cardiologist Susan Alexander, M.D., who noted  
28 plaintiff's EF was 15% in November of 2007 (Tr. 31,396). Dr.

1 Alexander diagnosed nonischemic cardiomyopathy, and opined  
2 plaintiff's EF was due to long-term IV drug use, specifically,  
3 cocaine, methamphetamines and narcotics (Tr. 395). Dr. Rodkey  
4 testified plaintiff's cardiomyopathy is the result of IV drug use  
5 over a period of three decades (Tr. 30,33).

6 The Commissioner acknowledges Dr. Rodkey opined plaintiff's  
7 cardiomyopathy met the Listings beginning on or about May of 2007  
8 (six months prior to November of 2007) (Ct. Rec. 18 at 9,  
9 referring to Tr. 33). The Commissioner points out Dr. Rodkey  
10 opined Mr. Struck's cardiac condition was caused by IV drug use  
11 rather than coronary artery disease. (Ct. Rec. 18 at 9; citing Tr.  
12 31,33,36,264,266,274,276,374,377). It is hard to imagine a  
13 clearer case of DAA as a materially contributing factor.

14 The Commissioner notes some of the evidence supporting Dr.  
15 Rodkey's DAA opinion includes: (1) Mr. Struck's condition  
16 "markedly improved" during a period of abstinence (Ct. Rec. 18 at  
17 9-10, referring to Tr. 30,36-37,269,380); and (2) in September of  
18 2006 Mr. Struck's EF was normal. About a year later plaintiff  
19 tested positive for cocaine, opiates and amphetamines. His EF was  
20 15% (Tr. 19,31,274-276,370,373-375,394).

21 Plaintiff fails to note that the record as a whole, including  
22 the opinions of treating specialists, fully supports the ALJ's  
23 determination Mr. Struck is disabled when DAA is included and DAA  
24 is contributing factor material to the disability determination.

25 Because plaintiff is disabled with DAA included, as the ALJ  
26 found, he is barred from receiving benefits.

27 Plaintiff argues the ALJ had a duty to determine if Dr.  
28 Rodkey would find Mr. Struck met or equaled the current Listing

1 for cardiomyopathy; alternatively, he avers the ALJ should have  
2 taken judicial notice Mr. Struck's heart condition met or equaled  
3 the current Listings 4.02 and 4.04 (Ct. Rec. 14 at 10).

4 Plaintiff's argument fails because the ALJ found Mr. Struck  
5 disabled when DAA is included. In such cases, the only relevant  
6 issue is the materiality of DAA. And as the Commissioner  
7 accurately observes, plaintiff bears the burden of establishing a  
8 Listing-level impairment at step three, not the Commissioner.

9 Plaintiff alleges Dr. Rodkey's RFC is erroneous because he  
10 failed to factor in the effects of all of Mr. Struck's combined  
11 impairments, an error repeated by the ALJ when he adopted Dr.  
12 Rodkey's RFC (Ct. Rec. 14 at 10). The record states otherwise.  
13 Dr. Rodkey testified cardiomyopathy is plaintiff's only severe  
14 impairment, and there is not "anything about those [nonsevere  
15 impairments] that in combination with an ejection fraction of 40  
16 [normal] that would limit his activities" (Tr. 35).

17 The ALJ assessed an RFC for medium work when DAA is excluded.  
18 His determination is fully supported by the evidence, including  
19 most of the opinions of treating professionals, the agency  
20 reviewing doctors, and the medical expert's testimony. Plaintiff  
21 essentially argues the ALJ should have given more credit to the  
22 opinion of an ARPN than to those of treating cardiologists. The  
23 law dictates otherwise. Plaintiff alleges his jobs while  
24 incarcerated do not qualify as past relevant work. Because  
25 plaintiff cites no authority for the proposition the Court does  
26 not consider it. The ALJ's assessment of the medical opinion and  
27 other evidence is supported by the record and without legal error.  
28 Accordingly, the RFC and questions to the VE are sufficient. See

1 *Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9<sup>th</sup> Cir. 2001).

2 The RFC is also supported by the ALJ's assessment of  
3 plaintiff's credibility, as set out below. Because the RFC is  
4 based on the limitations found supported by credible evidence, the  
5 ALJ's determinations are without error.

6 **C. Plaintiff's credibility**

7 To aid in weighing the conflicting medical evidence, the ALJ  
8 evaluated plaintiff's credibility and found him less than fully  
9 credible (Tr. 23). Credibility determinations bear on evaluations  
10 of medical evidence when an ALJ is presented with conflicting  
11 medical opinions or inconsistency between a claimant's subjective  
12 complaints and diagnosed condition. See *Webb v. Barnhart*, 433  
13 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

14 It is the province of the ALJ to make credibility  
15 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
16 1995). However, the ALJ's findings must be supported by specific  
17 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
18 1990). Once the claimant produces medical evidence of an  
19 underlying medical impairment, the ALJ may not discredit testimony  
20 as to the severity of an impairment because it is unsupported by  
21 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
22 1998). Absent affirmative evidence of malingering, the ALJ's  
23 reasons for rejecting the claimant's testimony must be "clear and  
24 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).  
25 "General findings are insufficient: rather the ALJ must identify  
26 what testimony not credible and what evidence undermines the  
27 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*  
28 *Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

1 The ALJ relied on several factors when he assessed  
2 plaintiff's credibility, some of which include: (1) inconsistent  
3 statements about drug use; (2) failure to follow prescribed course  
4 of treatment; and (3) activities inconsistent with the degree of  
5 impairment alleged. (Tr. 19 at fn 1, Tr. 23). Each is clear,  
6 convincing and supported by the record.

7 The ALJ notes in July of 2006 plaintiff told treating  
8 physician L. Douglas Waggoner, Jr., M.D., he had been clean since  
9 August of 2003 (Tr. 19 at fn 1, referring to Tr. 264). The ALJ  
10 politely opines plaintiff may have been an unreliable historian  
11 (Id). In November of 2008, plaintiff told Eric Pearson, PAC, he  
12 quit drugs in 2003 (Tr. 441). On September 24, 2007, Mr. Struck  
13 tested positive for cocaine, methamphetamine and opioids (Tr. 370,  
14 393). Citing *Verduzco v. Apfel*, 188 F.3d 1087,1090 (9<sup>th</sup> Cir.  
15 1999), the Commissioner correctly observes untruthfulness about  
16 substance abuse is a clear and convincing reason to reject a  
17 claimant's testimony (Ct. Rec. 18 at 15).

18 In September of 2007, plaintiff told treatment providers in  
19 the ER he had not taken prescribed cardiac medication for at least  
20 a year (Tr. 370). Failing to follow a prescribed course of  
21 treatment can cast doubt on a claimant's sincerity. *Fair v.*  
22 *Bowen*, 885 F.2d 597,603 (9<sup>th</sup> Cir. 1989); *Thomas v. Barnhart*, 278  
23 F.3d 947,958-959 (9<sup>th</sup> Cir. 2002).

24 The ALJ found plaintiff's activities of making home repairs,  
25 doing yard work, and walking 5-6 blocks without rest "belie his  
26 allegations that he is essentially incapacitated" (Tr. 23). This  
27 is a clear and convincing reason to doubt veracity. *See Tomasetti*  
28 *v. Astrue*, 533 F.3d 1035 (9<sup>th</sup> Cir. 2008)(proper to discredit

1 testimony based on inconsistency with reported daily activities).

2 The ALJ's reasons for finding plaintiff less than fully  
3 credible are clear, convincing, and fully supported by the record.  
4 See *Thomas*, 278 F. 3d at 958-959 (proper factors include  
5 inconsistencies in plaintiff's statements, inconsistencies between  
6 statements and conduct, and extent of daily activities).

7 The ALJ is responsible for reviewing the evidence and  
8 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
9 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
10 trier of fact, not this court, to resolve conflicts in evidence.  
11 *Richardson*, 402 U.S. at 400. The court has a limited role in  
12 determining whether the ALJ's decision is supported by substantial  
13 evidence and may not substitute its own judgment for that of the  
14 ALJ, even if it might justifiably have reached a different result  
15 upon de novo review. 42 U.S.C. § 405 (g).

16 The record shows the ALJ's credibility assessment is  
17 supported by the evidence and by clear and convincing reasons.

18 The ALJ found DAA material to his determination, a legally  
19 and factually correct finding.

#### 20 CONCLUSION

21 Having reviewed the record and the ALJ's conclusions, this  
22 court finds that the ALJ's decision is free of legal error and  
23 supported by substantial evidence..

#### 24 IT IS ORDERED:

25 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is  
26 **GRANTED.**

27 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
28 **DENIED.**

1 The District Court Executive is directed to file this Order,  
2 provide copies to counsel for Plaintiff and Defendant, enter  
3 judgment in favor of Defendant, and **CLOSE** this file.

4 DATED this 28th day of April, 2010.

5 s/ James P. Hutton

6 JAMES P. HUTTON  
7 UNITED STATES MAGISTRATE JUDGE  
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